No. ~~1169~~ 79

In the Supreme Court of the United States

OCTOBER TERM, 1941

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA, EX REL. GENE McCANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA, EX REL. GENE McCANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the above named petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on March 31, 1942, upon an original petition for a writ of habeas corpus filed in that court, directing that respondent be released from the custody of petitioner.

OPINION BELOW

The opinion of the court below (R. 8–12) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 31, 1942 (R. 13). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Respondent, who was indicted for commission of a felony, knowingly and voluntarily waived the assistance of counsel. Being fully cognizant of his constitutional right to trial by jury, he thereafter made a motion that he be tried by the court without a jury; the trial court granted that motion. May a judgment of conviction lawfully be entered after a trial so conducted?

2. After conviction, the respondent appealed to the court below. Did that court have jurisdiction, while the appeal was pending, to entertain a petition for a writ of habeas corpus and to order the respondent's discharge from custody?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and pertinent statutes are set forth in the Appendix.

STATEMENT

Respondent was convicted on July 22, 1941, in the United States District Court for the Southern District of New York upon an indictment in six

counts for using the mails to defraud in violation of 18 U. S. C. § 338, and was sentenced to imprisonment for six years and to pay a fine of $600 (R. 2). He thereupon appealed to the court below and his appeal is still pending in that court, the time for filing a bill of exceptions having been extended from time to time (R. 8).

At the suggestion of the circuit court of appeals (R. 8), respondent filed a petition for a writ of habeas corpus in that court alleging that his trial and conviction "were a nullity" because he "was not represented by counsel" and "did not have the benefit of a jury to pass upon the issues of fact" (R. 2–3). The writ was issued (R. 1) and the United States Marshal made a return (R. 4–7). After argument on the petition and return, the court below ordered respondent's discharge from custody (R. 11).[1]

The pertinent facts, none of which are disputed, may be summarized as follows:

When respondent was called upon to enter his plea, the trial judge advised him to retain counsel but respondent refused, "stating in substance that

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[1] The final order (R. 13) directed that respondent "be forthwith released from the custody in which he now is" upon condition that he post bail of $1,000 "to secure his appearance to prosecute his appeal now pending in this court * * * and also to secure his appearance for his further trial and prosecution in the United States District Court upon said indictment." Respondent has remained in custody because of his inability to procure bail.

he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself" (R. 4). Again, when the case was called for trial, respondent repeated that "he desired to represent himself" for, although he was not admitted to the bar, "he had studied law and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be" (R. 5). In addition to various preliminary proceedings initiated by respondent prior to his trial, the record also shows that he has represented himself in extensive civil litigation (R. 5–6, 9). The petition for habeas corpus does not suggest that he did not knowingly and voluntarily waive the assistance of counsel.

Upon the trial, respondent moved to have the case tried by the judge without a jury. "There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney" following which respondent's motion was "granted on consent of the United States Attorney" (R. 5). Thereafter respondent signed the following waiver which was consented to by the Assistant United States Attorney and approved by the district judge (R. 7):

> I, GENE MCCANN, the defendant herein, appearing personally, do hereby waive a

trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Respondent represented himself throughout the ensuing trial which extended for two and a half weeks. Upon conviction, he filed an appeal which he has attempted to perfect in person, although the trial court and appellate court each suggested to him at least once the advisability of retaining counsel (R. 5).

Finally, respondent secured the assistance of counsel who, in applying to the court below for a reduction of the bail fixed by the trial court, raised the question of the jurisdiction of the district court to try respondent without a jury. The circuit court of appeals then "suggested that he take out a writ of habeas corpus returnable before us" (R. 8).

This suggestion was followed, the writ being issued on March 12, 1942,[2] by Circuit Judge A. N. Hand and made returnable "before the judges of the United States Circuit Court of Appeals, Second Circuit, then presiding" (R. 1). Argument was

[2] The writ was issued March 12, 1942, whereas the petition therefor is dated March 20, 1942. This is explained, we are advised by the United States Attorney, by reason of the fact that the circuit court of appeals at the time of argument requested respondent to withdraw his previous petition and file a substituted petition in order to eliminate certain issues of fact and reduce the matter to a pure question of law.

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heard before the court *en banc* with Judges L. Hand, Swan and Chase sitting. The court held (R. 8–9) that, pursuant to the dictum in *Whitney* v. *Dick*, 202 U. S. 132, 136, it had jurisdiction under 28 U. S. C. § 377 to entertain the writ in aid of its appellate jurisdiction. On the merits, the majority of the court held (R. 10–11) that, although respondent had unconditionally waived his right to the assistance of counsel and to trial by jury, he was nevertheless entitled to his discharge. In reaching this result, the court stated that "the Supreme Court has shown itself especially sensitive" concerning the right to trial by jury in *Patton* v. *United States*, 281 U. S. 276, and to the assistance of counsel in *Johnson* v. *Zerbst*, 304 U. S. 458 and "especially" in *Glasser et al.* v. *United States*, Nos. 30, 31, 32, October Term, 1941, decided January 19, 1942. The court therefore concluded (R. 11):

> Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge except upon the advice of an attorney, retained by him or assigned to him, even though that advice extends to no more than that particular choice.

Judge Chase, dissenting, expressed the view that the writ should be dismissed on the merits (R. 12).

REASONS FOR GRANTING THE WRIT

I

The far-reaching significance of the decision below in the administration of the federal criminal law needs little emphasis. If the accused may not waive a trial by jury except upon the advice of an attorney, as the court below held, it follows *a fortiori* that the advice of counsel is equally requisite to a valid plea of guilty where the accused by his own voluntary act effectively surrenders his liberty. During the fiscal year ending June 30, 1941, of the 40,100 defendants convicted in the United States District Courts, 3,349 were tried by the court and 4,977 had a jury trial. The other 31,774 apparently pleaded either guilty or *nolo contendere*. *Annual Report of the Director of the Administrative Office of the United States Court*, 1941, Table 11, p. 115; Table 13, p. 119. While the records available to us do not reveal precisely how many of those who waived jury trial or pleaded guilty did so without the advice of counsel, it is a matter of common knowledge, of which this Court may take judicial notice, that a large percentage of those who plead guilty do so after having waived assistance of counsel. Under the rationale of the decision below, all of those defendants who, without the advice of counsel, did plead guilty, or were tried by the court without a jury, would appear entitled to discharge upon habeas corpus.

Furthermore, although the court below professed to be deciding only the rights of the respondent upon the particular facts of this case (R. 11), it would seem logically to follow that if, as the court held, an accused, when defending himself *in propria persona*, may not waive the right to trial by jury, he also may not waive any of the other rights guaranteed to him under the Fifth and Sixth Amendments. For, contrary to the view expressed by the court below (R. 11), this Court has clearly indicated that the right to trial by jury is no more fundamental in the administration of the criminal law than the other rights guaranteed by the Constitution. See *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Schick* v. *United States*, 195 U. S. 65, 71–72; cf. *Belt* v. *United States*, 4 App. D. C. 25, 35–36; *In re Belt*, 159 U. S. 95, 99.[3] Yet it has consistently been held that these other constitutional rights may be waived.[4]

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[3] In *Palko* v. *Connecticut*, *supra*, this Court stated that the right to trial by jury is not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * *. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" it. The Court further observed that the right to a jury trial does not rise to the same "plane of social and moral values" as the right to the assistance of counsel which is "implicit in the concept of the ordered liberty" (pp. 325, 326).

[4] Thus, a defendant may waive his right to a "speedy trial," *Pietch* v. *United States*, 110 F. (2d) 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Daniels* v. *United States*, 17 F. (2d) 339, 344 (C. C. A. 9), certiorari denied,

Indeed, the effect of the decision below may well extend far beyond the waiver of express constitutional rights. For if, as the court stated, it is fundamentally unfair to permit an accused, who insists upon representing himself, to waive a trial by jury because "the ordinary layman does not have the necessary experience" to make an independent choice (R. 11), it would seem equally unfair to allow an accused, without the assistance of counsel, to waive, for example, seriously prejudicial errors concerning the admissibility of evidence or in the court's charge to the jury.[5]

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274 U. S. 744; *Worthington* v. *United States*, 1 F. (2d) 154 (C. C. A. 7), certiorari denied, 266 U. S. 626; *Phillips* v. *United States*, 201 Fed. 259, 262 (C. C. A. 8); his right to trial by an impartial jury "of the state [and district] where the said Crimes shall have been committed," *Hagner* v. *United States*, 54 F. (2d) 446, 447–449 (App. D. C.), affirmed, 285 U. S. 427; and his right "to be confronted with the witnesses against him," *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4), certiorari denied, 268 U. S. 691; *Fukunaga* v. *Territory of Hawaii*, 33 F. (2d) 396, 397 (C. C. A. 9), certiorari denied, 280 U. S. 593. Similarly, an accused may waive the privileges against being twice placed in jeopardy (*Trono* v. *United States*, 199 U. S. 521), and against self-incrimination (*Wilson* v. *United States*, 162 U. S. 613); *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618 (C. C. A. 2)), both of which are guaranteed by the Fifth Amendment.

[5] Compare *Johnson* v. *Zerbst*, 304 U. S. 458, at pp. 462–463, where this Court pointed out: "* * * the average defendant does not have the professional legal skill to protect himself * * *. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."

We believe that the rule enunciated below is neither required nor justified by the Constitution. Until the decision in this case, the right knowingly and voluntarily to waive the assistance of counsel has been in no way limited to any particular phase of a criminal proceeding,[6] and since *Patton* v. *United States*, 281 U. S. 276, 290, it has been settled in the federal courts that an accused may waive his right to trial by jury so long as there is compliance with the safeguards there prescribed by this Court.[7] In our view, there is nothing in the

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[6] *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463; *Williams* v. *Sanford*, 110 F. (2d) 526 (C. C. A. 5), certiorari denied, 310 U. S. 643; *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9), certiorari denied, 310 U. S. 624; *Moore* v. *Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10), certiorari denied, 310 U. S. 643; *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10), certiorari denied, 308 U. S. 553; *Zahn* v. *Hudspeth*, 102 F. (2d) 759, 761 (C. C. A. 10), certiorari denied, 307 U. S. 642; *Cundiff* v. *Nicholson*, 107 F. (2d) 162 (C. C. A. 4); *Franzeen* v. *Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9); *McCoy* v. *Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10); *Wilson* v. *Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10); *Pers* v. *Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9); *Ervin* v. *Sanford*, 27 F. Supp. 892 (N. D. Ga.).

[7] See *Ferracane* v. *United States*, 47 F. (2d) 677, 679, (C. C. A. 7); *Jabczynski* v. *United States*, 53 F. (2d) 1014, 1015 (C. C. A. 7); *United States* v. *Brunett*, 53 F. (2d) 219, 226 (W. D. Mo.); *Brouse* v. *United States*, 68 F. (2d) 294 (C. C. A. 1); *Irvin* v. *Zerbst*, 97 F. (2d) 257, 258 (C. C. A. 5); *United States* v. *Streul*, 99 F. (2d) 474, 478 (C. C. A. 2); *Hagner* v. *United States*, 54 F. (2d) 446, 448 (App.

Patton case, on the one hand, or in *Johnson* v. *Zerbst*, 304 U. S. 458 and *Glasser et al.* v. *United States, supra,* on the other—the decisions relied upon by the court below—which requires a contrary rule when the two rights chance to "coalesce" in the same case.

The circuit court of appeals recognized (R. 10) that, although the defendant in the *Patton* case was tried by a jury of eleven, "the opinion proceeded upon broader grounds" and held that an accused may consent to a trial "by the court without a jury". 281 U. S. at p. 290. The majority below, however, expressed the view that such a broad rule was unnecessary to the decision in the *Patton* case, because "trial by any jury, however small," unlike trial by a judge, preserves the "fundamental elements" of the right to jury trial (R. 10–11). But this Court in the *Patton* case expressly rejected "*in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve" 281 U. S. at p. 290. Similarly, contrary to the suggestion below that an accused has a right to a trial before jurymen who "unlike any official, are in no wise accountable" for what they do (R. 10–11), this Court said that "* * * since it

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D. C.); *Spann* v. *Zerbst*, 99 F. (2d) 336 (C. C. A. 5); *Brown* v. *Zerbst*, 99 F. (2d) 745, 746 (C. C. A. 5); cf. *Dillingham* v. *United States*, 76 F. (2d) 36 (C. C. A. 5); *Rees* v. *United States*, 95 F. (2d) 784 (C. C. A. 4).

was permissible for an accused to plead guilty and thus waive *any* trial, he must necessarily be able to waive a *jury* trial" (281 U. S. at p. 291) and, again, that it would be inconsistent "to permit the accused to dispense with *every* form of trial by a plea of guilty, and yet forbid him to dispense with a *particular* form of trial by consent" (*id.*, p. 306).

Johnson v. *Zerbst*, and *Glasser et al.* v. *United States*, *supra*, the other two cases relied upon by the court below, lend no support to its decision. In each case this Court recognized the right of an accused to waive the assistance of counsel. Consequently, the statement of the court below that those decisions compel the conclusion that the assistance of counsel is a jurisdictional requisite to a valid waiver of trial by jury is, we believe, entirely without foundation. Indeed, if the accused cannot legally be convicted except by the verdict of those who will "melt anonymously in the community" and who are subject to the "mollifying influence of current ethical conventions", as the court indicated (R. 10-11), it would seem immaterial whether the accused was represented by an attorney or not. Nor has it been suggested until now that the right to the assistance of counsel is required where the accused is charged with a felony but not when he stands trial for a misdemeanor.

Because the decision below may have such far-reaching effects upon other cases, because it is, we believe, contrary to the applicable decisions of

this Court, and because, in our view, it enunciates a clearly erroneous rule with respect to the constitutional requisites of a fair trial, we submit that review by this Court is plainly warranted.

II

In addition to the issue on the merits, the decision below presents an important and doubtful question concerning the jurisdiction of circuit courts of appeals to issue writs of habeas corpus under circumstances such as those here involved. The court below, accepting the fact that it has no authority to issue original and independent writs of habeas corpus,* nevertheless held that it had power to issue the writ here in question by virtue of the provisions of Section 262 of the Judicial Code, conferring upon the circuit courts of appeals "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise" of their appellate jurisdiction. The court reasoned that issuance of the writ in this case was necessary to

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* *United States* v. *Mayer*, 235 U. S. 55, 65–66; *Whitney* v. *Dick*, 202 U. S. 132, 137; *Sweetney* v. *Johnston*, 121 F. (2d) 445 (C. C. A. 9), certiorari denied, October 13, 1941; *In re Anderson*, 117 F. (2d) 939, 940 (C. C. A. 9); *De Maurez* v. *Swope*, 110 F. (2d) 564, 565 (C. C. A. 9); *Ferguson* v. *Swope*, 109 F. (2d) 152 (C. C. A. 9); *Smith* v. *Johnston*, 109 F. (2d) 152, 156 (C. C. A. 9); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10); cf. 28 U. S. C. § 451; *United States* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3).

the complete exercise of its appellate jurisdiction[9] for two reasons: (1) "it is at least doubtful" that respondent will be able to make up an adequate bill of exceptions to permit review of all of his assignments of error, and although he might prepare a bill which would be sufficient to raise "the single point raised by this writ * * * that would make the relator stake his whole case on that point, which is not fair"; and (2) the court has power, upon an application for release without bail pending appeal, "incidentally [to] decide that the appeal would succeed" but does not have the power "to dispose of the appeal" and excuse the appellant from going "on with the preparation of his bill of exceptions."

It is well settled, however, that the appellate jurisdiction of a circuit court of appeals is wholly statutory,[10] and in criminal cases its power to re-

[9] Although Judge A. N. Hand signed the writ issued for the purpose of inquiring into the causes of the respondent's detention (R. 1), this was not a habeas corpus proceeding before a judge of a circuit court of appeals, authorized by 28 U. S. C. §§ 452 and 463 (a), for the writ was made returnable before the court (R. 1), was considered by the court *en banc* (R. 8), and the order resulting therefrom was an order of the court (R. 13). Cf. *Carper* v. *Fitzgerald*, 121 U. S. 87.

[10] *Leimer* v. *State Mut. Life Assur. Co.*, 106 F. (2d) 793 (C. C. A. 8), appeal dismissed, 107 F. (2d) 1003); *In re Philadelphia & Reading Coal & Iron Co.*, 103 F. (2d) 901, 903 (C. C. A. 3); *United States* v. *Rayburn*, 91 F. (2d) 162, 164, C. C. A. 8); *Fidelity & Casualty Co. of New York* v. *Turby*, 81 F. (2d) 229 (C. C. A. 3); *Emlenton Refining Co.* v. *Chambers*, 14 F. (2d) 104, 105 (C. C. A. 3), certiorari denied, 273 U. S. 731; cf. *Sumi* v. *Young*, 300 U. S. 251, 252.

view a conviction is limited by Section 128 of the Judicial Code (28 U .S. C. § 225) to review by appeal. *United States* v. *Mayer,* 235 U. S. 55, 65–66; *Morgan* v. *Thompson,* 124 Fed. 203, 204 (C. C. A. 8); cf. *Sumi* v. *Young,* 83 F. (2d) 752, 753 (C. C. A. 9), affirmed, 300 U. S. 251. It would seem, therefore, that a writ of habeas corpus may be issued by that court in aid of its jurisdiction to review a conviction only as an auxiliary process to aid the appeal. *United States* v. *Mayer, supra,* pp. 65–66; *Whitney* v. *Dick, supra,* p. 136; *McClellan* v. *Carland,* 217 U. S. 268, 279, 280. This would include, for example, the power to issue writs of habeas corpus *ad testificandum* and *ad prosequendum* in appropriate cases. But where, as here, the writ is used as a substitute for, rather than as an aid to, the appeal, the power would seem to be lacking. For Congress has authorized only district courts and this Court, or judges of the circuit courts of appeals sitting as district judges,[11] to entertain an original habeas corpus proceeding to test the validity of a judgment and commitment. 28 U. S. C. §§451, 452, 463 (a); see cases cited n. 8, *supra.*

That the writ in this case was used as a substitute for, rather than as an aid to, the appeal seems plain. The court below admitted (R. 9) that the

[11] Sections 452 and 463 (a) of title 28, U. S. C., each provide that "the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had".

respondent could have presented on appeal the same contention raised by his petition for habeas corpus, and—assuming the decision below to be correct on the merits—he could also have obtained his release by habeas corpus in the district court or in this Court. Issuance of the writ merely because "there is danger" that respondent cannot perfect his appeal or because the court is satisfied from his application for bail that "the appeal will succeed" seems, therefore, clearly to be the exercise of original rather than appellate jurisdiction.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

APPENDIX

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 262 of the Judicial Code (28 U. S. C. § 377), provides:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

28 U. S. C. §§ 451, 452 and 463 (a), relating to the power of courts to issue writs of habeas corpus, provide:

> Sec. 451. The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

Sec. 452. The several justices of the Supreme Court and the several judges of the circuit courts of appeals and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Sec. 463 (a). In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

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